IN THE

Supreme Court of the United States

October Term, 1942

No.....

CATHERINE NESA CONTERNO,

Petitioner,

vs.

NAT ROGAN, Collector of Internal Revenue,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Statement.

A statement disclosing jurisdiction has heretofore been made in the preceding petition under IV. A statement disclosing the proceedings in the Circuit Court of Appeals has heretofore been made in the preceding petition under VI. A statement of the case has heretofore been made in the preceding petition under I. All of the above statements are hereby adopted and made a part of this brief.

II.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that Section 611 of the Act of February 24, 1919 (Revenue Act of 1918, as amended, now Section 3030(a)(1)(A) of the Internal Revenue Code), said statute being quoted in the preceding petition under II, laid a tax upon the production of wine rather than upon the sale or removal for consumption or sale.

2. The Circuit Court of Appeals erred in resorting to administrative interpretation as an aid to construction of the above statute, inasmuch as the meaning of the statute is clear.

3. The Circuit Court of Appeals erred in relying upon *Liggett & Myers Tobacco Company v. U. S.* as binding authority in the case at bar, since both the law and the facts are distinguishable.

III.

ARGUMENT.

Summary of the Argument.

Briefly, petitioner's position is that the statute here involved is subject to only one reasonable construction. It levies a tax to attach upon the sale of wine or its removal for consumption or sale. Inasmuch as in the case at bar the wine upon which the tax was assessed was destroyed prior to its sale or removal, the wine never became subject to the tax. Petitioner relies upon three arguments. Firstly, the plain wording of the statute allows only one reasonable construction, and this construction has been

adopted by the only court that has heretofore ruled upon the question. Secondly, administrative regulation by the Internal Revenue Bureau did not change the result. Thirdly, the case so strongly relied upon by the Circuit Court of Appeals has no application to the case at bar.

POINT A.

The Statute in Question Is Subject to Only One Reasonable Construction, That the Tax Assessed Attaches at the Time of Sale or Removal for Consumption or Sale.

Petitioner has urged throughout the proceedings below that Congress, by enacting the statute involved herein, intended to impose a tax upon the sale or removal of wine and not upon its production. The language of the statute is perfectly clear. Pertinent parts of the statute in question are here quoted for the convenience of the court.

> "Upon all still wines, * * * there shall be levied, collected, and paid taxes at rates as follows, *when sold or removed for consumption or sale*:" (Emphasis supplied.)

Immediately upon reading the language of the statute one notices that the adverbial clause "when sold or removed for consumption or sale" immediately follows the phrase "shall be levied, collected, and paid taxes at rates as follows." There is no attempt to separate the verbs and thus make the adverbial clause modify only one. The phrase "taxes at rates as follows" refers to all three of the preceding verbs. Therefore, the adverbial clause immediately following must of necessity modify all three of the preceding verbs. Due to the structure of the sentence,

the clause denoting time can only apply to all three of the verbs collectively. To make the clause denoting time apply merely to the last verb is to adopt a strained and unnatural interpretation without any logical reason therefor.

Respondent has urged in the proceedings below that the adoption of petitioner's theory results in nullifying certain portions of the statute. Specifically, respondent states that the following portion of Section 3030(a)(1)(A), Internal Revenue Code, is thereby rendered meaningless:

> "The taxes imposed by this subparagraph (A) of this paragraph shall not apply * * * to wines produced for the family use of the duly registered producer thereof and not sold or otherwise removed from the place of manufacture and not exceeding in any case two hundred gallons per year."

Respondent has contended that petitioner's theory renders unnecessary the inclusion of the quoted part of the statute. Petitioner has contended that the purpose of the quoted portion is to allow a producer of wine to remove a certain portion of wine from the place of production for the sole purpose of family consumption. Without such a provision, the tax under either petitioner's or respondent's theory would attach when the wine was removed for consumption even though the amount removed was insignificant. The quoted portion is not rendered unnecessary by petitioner's contention, but rather such a provision is absolutely imperative if the producer is to be permitted to remove wine made by himself for his own consumption without the payment of tax.

Respondent also contends that Section 3039(a), Internal Revenue Code, is rendered meaningless by petitioner's interpretation. This section provides as follows:

> "The Commissioner, with the approval of the Secretary, is authorized to make such allowances for unavoidable loss of wines while on storage or during cellar treatment as in his judgment may be just and proper."

But this section does not state that the Commissioner may make allowances for *unsold* wines lost while on storage. If the wines had been sold for future delivery, or even if the wine maker had entered into a contract to sell the wine at a future time, without such a provision the tax would attach even though no benefits had accrued. The section does not direct the Commissioner to abate the tax, but rather it *permits* the Commissioner in his discretion to abate the tax in the event the tax had legally attached prior to destruction. It is by no means uncommon for a wine maker to contract for the sale of his product before cellar treatment or aging has been completed. During this period of time the wine maker is protected by reason of Section 3039(a) in the event the wine is destroyed. Such a provision is imperative to prevent the harsh effects resulting from the imposition of the tax as aforesaid. In the case at bar, the wine was destroyed while on storage but before being sold, contracted for sale or encumbered in any way. [R. 17, 18.]

The only reported case that has ruled upon the statute in question is the case of *Fresno Grape Products Corp v. U. S.* (Court of Claims, June 3, 1935), 11 Fed. Supp. 55. In this case plaintiff, a wine producer, sold a quantity

of wine. Before removal from the winery, but after the sale, the wine was changed into vinegar stock by the addition of acetic acid. Thereafter the vinegar stock was removed. Defendant levied a tax under the provisions of Section 611 of the Revenue Act of 1918 upon the wine, which plaintiff paid under protest. In respondent's brief filed in the court below, this section is conceded to be substantially the same as the statute under which the tax was levied in the case at bar. After its claim for refund had been rejected, plaintiff sued for recovery of the tax. Plaintiff's theory was that the tax was essentially a beverage tax and that, since the wine was not to be used as a beverage and at the time of removal the product had ceased to be wine, the tax was invalid. Defendant's theory was that at the time of sale the wine was a potable beverage and was therefore subject to a tax. The court held in favor of the taxpayer, saying at page 59:

> "In the instant case, the statute imposes a tax and directs its collection on wines stored in a bonded warehouse when it is sold or removed from such premises for consumption or sale. *The tax is not imposed on wine held in a bonded warehouse for sale, but it attaches and is payable only when wine so held is sold or removed for consumption or sale. The defendant admits in the brief, and the regulations, as we have seen, provide, that when wine stored in a bonded warehouse turns to vinegar from natural causes it is not taxable under section 611, upon sale or removal."* (Emphasis supplied.)

In the above quotation, attention is called to the fact that the defendant conceded that if the wine had turned to vinegar from natural causes before sale, the tax could

not have been collected. Petitioner submits that destruction by fire should be treated no differently than destruction by any other cause.

The decision may be said to be precisely in point. The theory adopted is that contended for by petitioner. The decision was rendered not by one judge, but by four judges, all of whom concurred, thus entitling the case to be considered as persuasive authority. The decision was never appealed by the Government. Petitioner's theory is upheld, therefore, not only by the language of the statute itself, but by the only case that has heretofore construed the statute.

POINT B.

Administrative Regulation With Respect to the Statute Involved Herein Does Not Prevent the Adoption of Petitioner's Theory.

Respondent contended in the court below that administrative regulation of the Bureau of Internal Revenue should be resorted to as an aid to statutory construction. Petitioner contended that this principle can only apply in the event the meaning of the statute to be construed is in doubt. This court has stated in *U. S. v. Graham*, 110 U. S. 219, 221; 28 L. Ed. 126, 127:

> "Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and it is not allowable to interpret what has no need of interpretation. If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive if not absolutely controlling, in its effect.

> But with language clear and precise and with its meaning evident, there is no room for construction and, consequently, no need of anything to give it aid. The cases to this effect are numerous. Edwards v. Darby, 12 Wheat., 206; U. S. v. Temple, *supra*; Swift Co. v. U. S., 105 U. S. 695 (XXVI, 1109); Ruggles v. Ill., 108 U. S. 526 (XXVII, 812)."

And again this court stated in *Fairbank v. U. S.* 181 U. S. 283, 311; 45 L. Ed. 862, 874:

> "From this resume of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful."

Petitioner has urged under Point A of this brief that the statute involved herein is perfectly clear. The court below did not specifically hold that the meaning of the statute was left in doubt, but the court below did give effect to administrative regulation in arriving at its decision. [R. 69.] We respectfully submit that the court was in error in so doing.

Assuming, however, that the statute involved herein is of doubtful meaning and that therefore resort to administrative regulation as an aid to its construction was

justified, petitioner has been unable to find any regulation which states or necessarily implies that the tax imposed attaches at production rather than at sale or removal. Certain of the regulations which were relied upon by respondent in the court below as establishing his contention that administrative interpretation of the wine taxing statute followed his theory are reprinted in the appendix to this brief. The regulations relied on are of two types. One type provides for an allowance for evaporation or accidental loss of wines on storage or during cellar treatment, but no regulation refers to *unsold* wine on storage or during cellar treatment. These are the regulations promulgated by the Commissioner by virtue of the power granted him by Internal Revenue Code, Section 3039(a), discussed earlier in this brief. This type of regulation is certainly not contrary to petitioner's position. The other type of regulation requires inventories and check-lists and permits the destruction of spoiled wine without payment of tax in the presence of an internal revenue officer. The primary purpose of this type of regulation is to prevent evasion of taxes.

Petitioner does not dispute the validity of such regulations. They are to provide a set of figures that may be checked against the return made by the taxpayer. These are reasonable regulations seeking to protect the Government's taxing interests. They do not attempt to clarify the taxing statute. They do not attempt to rule that the wine tax attaches at the time of production, therefore they cannot have the effect claimed by respondent. They cannot serve as an aid to the interpretation of the taxing statute. The court below recognized the force of this contention of petitioner in its opinion. [R. 69.]

Respondent contended in the court below that the regulations above referred to followed by a re-enactment of the statute in the same form constituted an adoption by Congress of the administrative regulation. Petitioner replied that this principle of law was subject to two well-defined limitations. One limitation is expressed in the Supreme Court case of *Biddle v. Commissioner of Internal Revenue,* 302 U. S. 573, at page 582; 82 L. Ed. 431, at page 439, where the court states:

> "Where the law is plain the subsequent reenactment of a statute does not constitute adoption of its administrative construction. Iselin v. United States, 270 U. S. 245, 70 L. ed. 566, 46 S. Ct. 248; Louisville & N. R. Co. v. United States, 282 U. S. 740, 75 L. ed. 672, 51 S. Ct. 297; Helvering v. New York Trust Co., 292 U. S. 455, 78 L. ed. 1361, 54 S. Ct. 806, *supra.*"

The second regulation is well illustrated by the case of *Texas & P. R. Co. v. U. S.,* 289 U. S. 627, at 643; 77 L. Ed. 1410, at 1425, where it is stated:

> "We think that at the date of the passage of the Transportation Act, no such administrative practice had been established as to require the conclusion that in failing to amend Sec. 3 the Congress approved any asserted power to adjust export and import rates in the interests of the ports alone."

The case of *Helvering v. New York Trust Co.,* 292 U. S. 455, 78 L. Ed. 1361, concerned the meaning that should be attached to the Congressional definition of the words "capital assets" for income tax purposes under the Internal Revenue Act of 1921. The regulation approved in 1922 didn't purport to define these words, although it dis-

cussed an analogous situation. Certain other rulings were made. The Revenue Act of 1924 retained the same definition as the prior Act. The Commissioner contended that Congress thereby approved this construction. The court held otherwise, saying (292 U. S. 468, 78 L. ed. 1368):

> "The definition had not been construed in any Treasury decision, by the Board of Tax Appeals or by any court prior to that enactment. The dates of all constructions of the definition to which our attention has been called are shown in the margin. The Regulation above referred to was approved February 15, 1922. *In respect of the question here involved, it puts no construction upon the definition.* The rulings, I. T. 1379, 1660 and 1889, cited by the Commissioner were made before the passage of the 1924 Act but they 'have none of the force or effect of Treasury decisions and do not commit the Department to any interpretation of the law.' See cautionary notice published in the bulletins containing these rulings. *It does not appear that the attention of Congress had been called to any such construction. There is no ground on which to infer that by the 1924 Act Congress intended to approve it.*" (Emphasis added.)

Petitioner has previously pointed out that there has been no administrative regulation which purported to declare that the tax was imposed on production rather than sale. If, as claimed by respondent in the court below, it has been the long continued practice of the Internal Revenue Bureau to consider the tax here under discussion a production tax, it seems at least strange that no appeal was taken by the Government in *Fresno Grape Products Corp. v. U. S., supra,* previously cited to this court as upholding petitioner's contention.

POINT C.

The Case of Liggett & Myers Tobacco Co. v. U. S., 299 U. S. 383; 81 L. Ed. 294, so Strongly Relied Upon by the Circuit Court of Appeals, Has No Application to the Case at Bar.

Respondent has relied strongly upon the opinion of this court rendered in *Liggett & Myers Tobacco Co. v. U. S.*, 299 U. S. 383; 81 L. Ed. 294. That case involved the question of whether or not a tax levied upon tobacco became a burden upon the state to which the tobacco was sold, contrary to constitutional provisions. This court held that the statute involved levied a tax upon the manufacturer of tobacco and therefore was in fact a tax upon the manufacture rather than sale and only indirectly burdened the buyer. The pertinent parts of the statute construed in the *Liggett & Myers* case follow:

> "Upon all tobacco * * * manufactured in * * * the United States, and hereafter sold by the manufacturer * * * there shall be levied, collected, and paid * * * a tax of 18 cents per pound, *to be paid by the manufacturer * * * thereof.*" (Section 401(a) of the Revenue Act of 1926, 44 Stat. 9; emphasis supplied.)

The court below held this statute to be basically similar to the statute involved in the case at bar. [R. 68.] Petitioner contended that the tobacco tax statute was materially different and therefore judicial construction of the statute should not be binding upon the court in the case at bar. It is significant that the tobacco statute declares that the tax is to be paid by the manufacturer as distinguished from the seller. The wine statute does not state that the producer must pay the tax. The tobacco statute

contains no phrase modifying "and shall be levied, collected, and paid." In the wine statute the phrase "levied, collected, and paid" is followed by the phrase, "when sold or removed for consumption or sale." The word "when," denoting time of levy, does not appear in the tobacco statute.

Petitioner contends that the intention of Congress when enacting the wine statute was to impose the tax upon sale. There is a reason for Congress to distinguish between tobacco and wine. It is common knowledge that wine is kept on storage for long periods of time during which it undergoes an aging process. This is not true of tobacco. Tobacco will be immediately sold. There is therefore no reason for Congress to withhold the levy of the tax. In the case of wine making, however, there is an adequate reason to withhold the attaching of the tax. The court below apparently overlooked this distinction, as shown by the following excerpt from the Circuit Court of Appeals opinion:

> "Of course, tobacco is manufactured and wine is produced, for sale, and both the tobacco and the wine will, in due course, be sold and removed from the place of production. Congress, in enacting tax laws, had this in mind and did not provide for the highly unlikely, mere possibility that the manufactured tobacco and the produced wine are to be or will be kept unsold or unmoved from the factory or the winery indefinitely. Knowing that in due course these commodities will be directed into trade channels, there is nothing strange in the fact that Congress withheld the payment of the tax until they had reached that status." [R. 69.]

Before the tax burden is placed upon the producer by a decision of this court, it should be clear that Congress so intended to place the burden. Petitioner submits that the statute involved herein, far from disclosing such an intention, clearly indicates the intention of Congress was to impose the burden of the tax only *after* sale or removal for consumption or sale.

In *Indian Motocycle Co. v. U. S.*, 283 U. S. 570; 75 L. Ed. 1277, this court was asked to construe a statute that laid an excise tax upon motorcycles. Again, the issue was not whether the article taxed ever became subject to the tax, but rather whether or not the tax constituted a burden upon the buyer. This court held that the tax was imposed upon the sale of the article and therefore constituted a burden upon the buyer. The statute involved was Section 600 of the Revenue Act of 1924, 43 Stat. 253, 322, U. S. C., Title 26, Section 882, which provided that there "shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased." In the course of this court's decision, it is stated, at 283 U. S. 574; 75 L. Ed. 1280:

> "We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale."

This court distinguished the *Indian Motocycle* case in the *Liggett & Myers* case as follows:

> "Indian Motocycle Co. v. U. S., 283 U. S. 570, 75 L. Ed. 1277, 51 S. Ct. 601, *supra,* much relied upon by petitioner, considered a tax of five per

centum of the price obtained upon sale of the article; it rose or fell according to the amount received by the seller." (299 U. S. 387; 81 L. Ed. 297.)

It would seem, therefore, that this court has been heretofore guided to a great extent by the nature of the tax imposed. If the tax does not vary according to the resale value of the commodity, a tax on manufacture is indicated. If the tax does vary according to resale value, a tax on sale is indicated. Petitioner respectfully calls this court's attention to the fact that the wine tax has always been a graduated tax which increases as the alcoholic content increases and hence the resale value of the wine becomes greater. The following portion of Section 3030(a) (1) (A), Internal Revenue Code, as it now appears, is reprinted for the purpose of showing the increase of rates as aforesaid:

"On wines containing not more than 14 per centum of absolute alcohol, 10 cents per wine-gallon, the per centum of alcohol under this section to be reckoned by volume and not by weight;

"On wines containing more than 14 per centum and not exceeding 21 per centum of absolute alcohol, 40 cents per wine-gallon;

"On wines containing more than 21 per centum and not exceeding 24 per centum of absolute alcohol, $1.00 per wine-gallon;

"All such wines containing more than 24 per centum of absolute alcohol by volume shall be classed as distilled spirits and shall pay tax accordingly."

It is fundamental that revenue statutes must be construed most strongly against the taxing authority. A few

of this court's decisions with respect to such principle of construction are cited in the foot-note.[1]

Neither the *Liggett & Myers* case nor the *Indian Motocycle* case involved the issue of whether or not the taxpayer became liable for the tax. In the case at bar, however, wherein the question of whether or not the tax attached at all is involved, this court should resolve all doubts in favor of your petitioner, the taxpayer.

Conclusion.

Petitioner submits that the foregoing petition and this brief support the following propositions:

1. The language of Section 611 of the Act of February 24, 1919 (Revenue Act of 1918, as amended, Section 3030(a)(1)(A), Internal Revenue Code), is clear and unambiguous. In said statute Congress imposed a tax upon wine to attach when said wine is sold or removed for consumption or sale. The Circuit Court of Appeals erred in holding that said statute imposed a tax upon the production of wine.

2. The administrative provisions of the Bureau of Internal Revenue may not be resorted to as an aid to interpretation, inasmuch as the statute involved is clear and unambiguous. Assuming, however, that the statute is ambiguous, no administrative regulation exists that is inconsistent with petitioner's theory.

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[1]*U. S. v. Isham*, 84 U. S. 496; 21 L. Ed. 728; *American Net & Twine Co. v. Worthington*, 141 U. S. 468; 35 L. Ed. 821; *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204; 74 L. Ed. 371; *Reinecke v. Gardner*, 277 U. S. 239; 72 L. Ed. 277.

3. *Liggett & Myers Co. v. U. S., supra,* is not applicable to the case at bar, since the statute construed therein is dissimilar. Moreover, the factual situation involved in the *Liggett & Myers* case is entirely at variance with the statute involved in the case at bar. The Circuit Court of Appeals erred in adopting the decision of the *Liggett & Myers* case as binding its decision in the case at bar.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory power, by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals.

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